IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (PHENTERMINE, FENFLURAMINE, DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 1203
THIS DOCUMENT RELATES TO:	:	
MURIEL THELEN, an individual, as executor for the estate of MICHAEL THELEN	:	
v.	:	
WYETH-AYERST LABORATORIES, et al.	:	CIV. NO. 98-20672

MEMORANDUM AND PRETRIAL ORDER NO. _____
STATE COURT REMAND

BECHTLE, J. APRIL , 1999

Presently before the court is plaintiff Muriel Thelen's ("Plaintiff"),[1] motion for remand or, in the alternative, to amend the Complaint and remand (Document #200346) and defendants Wyeth-Ayerst Laboratories Company's and American Home Products Corporation's response thereto. For the reasons set forth below, the court will grant Plaintiff leave to amend the Complaint.

I. BACKGROUND

On May 22, 1998, Plaintiff filed her Complaint in the San Francisco County Superior Court in the state of California. The

[1] Plaintiff brings this action as executor for the estate of Michael Thelen. Michael Thelen was a citizen of California and his citizenship is controlling for purposes of federal diversity jurisdiction. 28 U.S.C. § 1332(c)(2).

Complaint seeks relief for breach of express and implied warranties, strict product liability and negligence against various defendant pharmaceutical companies ("Defendant Pharmaceutical Companies"). None of Defendant Pharmaceutical Companies are incorporated under the laws of California, nor do any of them have their principal place of business in California. Plaintiff's Complaint also asserts a claim for medical negligence against Doe 1 ("Physician Defendant"), "a medical doctor licensed to practice medicine in the State of California and a resident of California." (Compl. ¶ 7.) Plaintiff designated Physician Defendant by a Doe name in an effort to comply with California Rule of Civil Procedure § 364, which provides that:

> [n]o action based upon [a] health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days prior notice of the intention to commence the action.

Cal. R. Civ. P. § 364(a).[2]

On July 7, 1998, Defendant Pharmaceutical Companies removed this action to the United States District Court for the Northern District of California. On August 31, 1998, the action was transferred to this court as part of MDL No. 1203. On October 20, 1998, Plaintiff filed the instant motion for remand, or in the alternative, for leave to amend the Complaint to name

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[2] To answer the jurisdictional question, the court need not rule on whether Plaintiff's effort to comply with Cal. R. Civ. P. § 364(a) was procedurally proper. Under California law, "the 90-day notice requirement of section 364 is not jurisdictional. Failure to comply merely furnishes a ground for [attorney] discipline by the State Bar." Lesko v. Superior Court, 127 Cal. App. 3d 476, 481 (1982).

Physician Defendant by her true name and remand.

II. DISCUSSION

Under the Federal Rules of Civil Procedure, a party may amend its pleading by leave of court, and "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Third Circuit has stated that "the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997). The court will grant Plaintiff leave to amend the Complaint. First, the court will address why Physician Defendant may be properly joined in this action under Federal Rule of Civil Procedure 20(a). Second, the court will address why it will remand this action back to state court should the joinder of Physician Defendant destroy diversity jurisdiction.

A. Joinder Under Fed. R. Civ. P. 20(a)

Defendant Pharmaceutical Companies argue that Physician Defendant cannot be properly joined to the instant action, and thus, because the remaining parties are of diverse citizenship, federal diversity jurisdiction exists and removal was proper. The court disagrees. Under the Federal Rules of Civil Procedure, defendants may be joined in one action:

> if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will

arise in the action.

Fed. R. Civ. P. 20(a).

The court finds that the joinder of Physician Defendant to this action is permitted under Federal Rule of Civil Procedure 20(a). See e.g., Rodriguez by Rodriguez v. Abbott Laboratories, 151 F.R.D. 529, 533-33 (S.D.N.Y. 1993) (allowing, under Rule 20, joinder of products liability claim against drug manufacturer and medical malpractice claim against hospital); Wilson v. Famatex GmbH Fabrik Fuer Textilausruestungsmachinen, 726 F. Supp. 950, 951-52 (S.D.N.Y. 1989) (allowing, under Rule 20, joinder of products liability claim against dyeing machine manufacturer and medical negligence claim against treating physician). Initially, the court finds that Plaintiff's claim against Physician Defendant arises out of the same series of transactions or occurrences as its claims against Defendant Pharmaceutical Companies. Specifically, Plaintiff's claims against Defendant Pharmaceutical Companies as well as those against Physician Defendant arise from injuries sustained as a result of the ingestion of Redux, a diet drug manufactured and marketed by Defendant Pharmaceutical Companies and prescribed by Physician Defendant. The court also finds that questions of law and fact common to both Defendant Drug Companies and Physician Defendant exist in this action. Specifically, overlapping issues will arise with regard to the cause and extent of Plaintiff's injuries. Common issues will also arise with respect to the

relative liability of Physician Defendant and Defendant Pharmaceutical Companies. The fact that different legal theories are asserted against Physician Defendant and Defendant Pharmaceutical Companies does not preclude their joinder under Rule 20(a). See Rodriguez, 151 F.R.D. at 533 ("It is well established that the presence of two different legal claims does not prevent joinder where the claims arise from a single source."); Mammano v. American Honda Motor Co., 941 F. Supp. 323, 325 (W.D.N.Y. 1996) (same). Thus, the court finds that Physician Defendant can be properly joined to this action under Federal Rule of Civil Procedure 20(a). Consequentially, granting Plaintiff leave to amend the Complaint to add Physician Defendant by her true name would not be futile. See Burlington Coat Factory, 114 F.3d at 1434 (stating futility as potential ground for denying leave to amend complaint).

B. Remand Under 28 U.S.C. 1447(e)

Defendant Pharmaceutical Companies originally removed this action based on diversity jurisdiction pursuant to 28 U.S.C. § 1332.[3] However, "[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." 28 U.S.C. § 1447(e); see Morze v. Southland Corp., 816 F. Supp. 369, 370 (E.D. Pa. 1993)

[3] District courts have jurisdiction over cases between citizens of different states when the amount in controversy is in excess of $75,000. 28 U.S.C. § 1332.

(holding that courts should exercise discretion to remand under § 1447(e) by considering equities involved, prejudices to parties and interests of justice).

Here, Plaintiff has an interest in avoiding duplicative litigation. This interest also comports with notions of judicial economy and efficiency. Although both defendants and the court have an interest in preventing forum shopping, such concerns do not exist here. Plaintiff originally intended to name Physician Defendant in this action and actually named her as "Doe 1" in an attempt to comply with California Rule of Civil Procedure § 364. In fact, Defendant Pharmaceutical Companies were aware of Plaintiff's intention to include Physician Defendant in the Complaint.[4] The court does not view Plaintiff's attempt to add Physician Defendant to this action as an attempt to forum shop, but rather, as an attempt to promote judicial economy and prevent duplicative litigation.[5] If, upon a renewed motion for remand

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[4] Plaintiff, in naming Physician Defendant as Doe 1, alleged that "[p]ursuant to Code of Civil Procedure 364, plaintiff has provided notice of intent to sue the Physician defendant. Because the ninety day period has not expired, plaintiff sues said doctor by a fictitious name and will, if the case does not settle, substitute the doctors' [sic] true name for said fictitious name at the expiration of the period." (Compl. ¶ 7.)

[5] The court notes that with regard to the issue of permissive joinder its instant opinion differs with its opinion in Pretrial Order No. 174 ("Witt"). Jean Witt v. American Home Products Corp., Civ. No. 98-20393, at 6-7 (July 14, 1998) (refusing, under Rule 20, to permit joinder of products liability claim against drug manufacturer and negligence claim against doctor). Under its current understanding of the claims and

following Plaintiff's amendment of the Complaint, the court determines that the addition of Physician Defendant would destroy diversity, the court will exercise its discretion under 28 U.S.C. § 1447(e) and remand the action back to California state court. [6]

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parties involved in this litigation, the court finds that the better view is that the joinder of products liability claims against a pharmaceutical manufacturer and negligence claims against a medical provider are permissible under Rule 20(a).

However, the court further notes that its opinion regarding permissive joinder in Witt was not determinative in that case. Special circumstances in the instant action--which did not exist in Witt--weigh in favor of permitting joinder and remanding the action. See infra pp. 6-7 & n.6. Like the instant action, in Witt, the plaintiff sought to amend her complaint to add her physician and to remand the action. However, in Witt the plaintiff "knew the physician's identity at the commencement of the suit, but waited until [a] late date [in the litigation],when she desire[d] remand to attempt to join the physician." Witt, Civ. No. 98-20393, at 4 & n.2. The court refused to permit joinder under Rule 20(a) and thus did not engage in an analysis of the equities involved in deciding whether to deny joinder or permit joinder and remand the action under 28 U.S.C. 1447(e). See id. at 6-7. In the instant action, Plaintiff has shown circumstances that favor granting her leave to amend her Complaint. However, in Witt, the plaintiff's unexplained delay in attempting to join her physician at a late date in the litigation would weigh against permitting joinder and remand under 28 U.S.C. 1447(e).

[6] The court notes that the Complaint currently does not allege the citizenship of Physician Defendant ("Doe 1"), but only that she is a resident of and licensed to practice medicine in California. (Compl. ¶ 7.) In deciding whether Plaintiff's Amended Complaint will destroy diversity in this action, the court notes that the citizenship, not residency, of the parties is determinative. Robinson v. Troy A. Nutter and Quality Supply Trucking, No. 94-7758, 1995 WL 61158, at *2 (E.D. Pa. Feb. 14, 1995) ("In order to establish jurisdiction under 28 U.S.C. § 1332, the citizenship of the parties, and not merely their residences or addresses, must be alleged."); see also QVC, Inc. v. J.D. Ross Int'l., No. 95-7946, 1996 WL 156422 (E.D. Pa. April 3, 1996).

III. CONCLUSION

For the foregoing reasons, the court will grant Plaintiff leave to amend the Complaint.

An appropriate Order follows.

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PRETRIAL ORDER NO.

AND NOW, TO WIT, this day of April, 1999, upon consideration of plaintiff Muriel Thelen's motion for remand, or in the alternative, to amend the Complaint and remand and defendants Wyeth-Ayerst Laboratories Company's and American Home Products Corporation's response thereto, IT IS ORDERED that:

1. the motion for remand is DENIED WITHOUT PREJUDICE; and
2. the alternative motion for leave to amend the Complaint is GRANTED.

BY THE COURT:

LOUIS C. BECHTLE, J.